

STATE OF OHIO )  
 ) SS:  
CUYAHOGA COUNTY )

IN THE COURT OF COMMON PLEAS  
CASE NO. CV-593403

A. ALFRED DELDUCO, et al. )  
 )  
 ) Plaintiffs )  
 )  
 ) vs )  
 )  
 ) ALBERT T. ADAMS, et al. )  
 )  
 ) Defendants )

**OPINION AND ORDER**

**MICHAEL J. RUSSO, JUDGE:**

This matter comes before the Court on the Motion of Plaintiffs' Counsel for an award of attorneys' fees and reimbursement of expenses. For the reasons that follow, the Court hereby awards attorney fees and expenses to Plaintiff's counsel in the amount of \$409,161.21.

**PROCEDURAL HISTORY**

On May 22, 2006, Boykin Lodging Company, a hotel real estate investment trust, announced that it had entered into a definitive merger agreement to be acquired by Braveheart Holdings LP, in a cash transaction valued at approximately \$416 million, including debt. Immediately prior to the closing of the transactions contemplated by the merger agreement, the interests of Boykin Lodging Company in the Pink Shell Beach Resort and Spa and the Banana Bay Resort & Marina - Marathon were to be sold to entities controlled by Robert W. Boykin, Chairman and Chief Executive Officer of Boykin Lodging Company, for a purchase price of approximately \$14.6 million. On June 6, 2006, the above-captioned case was filed in the

Cuyahoga County Court of Common Pleas. The complaint alleged, *inter alia*, breach of fiduciary duty, and Plaintiff(s) requested injunctive relief. Thereafter, several other lawsuits were filed on behalf of all Boykin Lodging shareholders. Boykin filed a Proxy Supplement with the SEC and mailed it to its shareholders on September 1, 2006. A special meeting of Boykin shareholders regarding the merger was held on September 12, 2006. On October 12, 2006, by way of a second amended complaint, all claims of the other lawsuits were consolidated with this case. An order preliminarily approving class action settlement was entered on October 20, 2006. Notice of settlement was mailed to Settlement Class members on November 10, 2006, and summary notice was published in the national edition of The Wall Street Journal. Hearing was held on January 17, 2007, wherein the Court found the settlement in this derivative action, as set forth in the Settlement Agreement, was fair, reasonable, adequate, and in the best interests of the Settlement Class. The Court also heard oral argument on the Motion of Plaintiffs' counsel for an award of attorneys' fees and reimbursement of expenses.

#### **ATTORNEY FEES**

In Ohio, attorney fees are recoverable in a shareholders' derivative action. *Apicella v. PAF Corporation* (1984), 17 Ohio App.3d 245. It is well established that the first step in determining an award of attorney fees is the computation of the lodestar figure. The lodestar is the number of hours expended by counsel and staff multiplied by the reasonable hourly rate. If the Court deviates from the lodestar, it must provide a clear explanation. *Turner v. Progressive Casualty Insurance Co.* (2000), 140 Ohio App.3d 112.

The benefit to the corporation must be demonstrated before recovery of attorney fees can be granted. *Mlinarcik v. E.E. Wehrung Parking, Inc.* (1993), 86 Ohio App.3d 134. Nevertheless, monetary recovery is not a prerequisite to an award of attorney fees. *Mills v. Electric Auto-Lite Co.* (1970), 396 U.S. 375. The United States Court of Appeals for the Sixth Circuit has pointed out the considerations that enter into the fixing of reasonable fees by a court. These considerations include: 1) the value of the benefit rendered to the corporation or its stockholders; 2) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; 3) whether the services were undertaken on a contingent fee basis; 4) the value of the services on an hourly basis; 5) the complexity of the litigation; and 6) the professional skill and standing of counsel involved on both sides. *Ramey v. Cincinnati Enquirer, Inc.* (6<sup>th</sup> Cir., 1974), 508 F.2d 1188.

### ANALYSIS

In this case, Plaintiffs' counsel has requested a lodestar of \$624,650.50, based upon 1,487.33 hours expended by attorneys and staff on behalf of Plaintiffs. Plaintiffs' counsel additionally requests the amount be increased by a multiplier of 2.4. As a starting point, the Court accepts the lodestar of \$624,650.50 and reimbursement of out-of-pocket expenses in the amount of \$96,835.96. The Court will not quibble with professional rates as the professional skill and standing of counsel involved on both sides is not in question.

Additionally, the Court must consider the benefit that has inured to the corporation as the result of the lawsuit. It is clear that the benefit that inured here was a "therapeutic" one in the form of a supplemental proxy. Counsel diverge on what benefit, if any, the supplemental proxy had at the shareholders' meeting and thus to the corporation. The Supplement contained

additional information regarding the following: (1) selected financial highlights of Boykin Lodging's operations in the second quarter of 2006; (2) the fairness opinion rendered by Houlihan Lokey; (3) certain tax consequences of Mr. Boykin in connection with the Excluded Asset Purchases; and (4) the sale process and certain events in connection with negotiations for the sale of Pink Shell and Banana Bay.

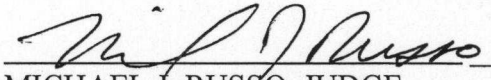
Plaintiffs' counsel argue that after the supplemental proxy was disseminated that almost a million shares voted against the transaction, thus the impact was significant. Defense counsel argues that the additional disclosures were an exceedingly modest benefit and were not an objective of the lawsuit, but rather a remedy tacked on to the proceedings at the very end. The Court agrees with the Defendants. The original complaint did not even ask the Court to order additional disclosure. More importantly, the Court finds that Plaintiffs' have failed to prove that the supplemental disclosures had any significant impact on the shareholders' voting. Therefore, the Court finds that the supplemental proxy ultimately yielded a minimal therapeutic benefit to the corporation.

The Court has difficulty justifying an award of the lodestar of \$624,650.50 to Plaintiffs' counsel because of the minimal benefit that inured to the corporation. In reviewing the procedural history, the Court notes that the original case was filed in early June of 2006, with claims of breach of fiduciary duty and a request for injunctive relief. An order preliminarily approving class action settlement was entered on October 20, 2006. The case had a short four-month duration and did not involve expedited discovery or any discovery disputes, or even a hearing on the requested injunctive relief. Accordingly, the Court finds that reasonable attorney

fees are ½ the amount of the lodestar - \$312,325.25, plus expenses in the amount of \$96,835.96.

**IT IS SO ORDERED.**

December 24, 2007

  
MICHAEL J. RUSSO, JUDGE

**CERTIFICATE OF SERVICE**

A copy of the foregoing Opinion and Order was mailed this 24<sup>th</sup> day of December, 2007, to:

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